Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

No. 93-1471

In The
Supreme Court of the United States
October Term, 1993

FRANCIS SOMENSKI and JOHN WALSH,
Petitioners,

vs.

COMPANHIA DE NAVEGACIO
LLOYD BRASILEIRO,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITIONERS' REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Charles Sovel
Freedman and Lorry, P.C.
Continental Building,
Suite 900
400 Market Street
Philadelphia, PA 19106
(215) 931-2500
Counsel for Petitioners

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Contrary to the assertion in respondent's Brief in Opposition, the issue of the shipowner's duty of care with respect to dangerous conditions existing in a cargo stow -- the issue which is before this Court in *Howlett v. Birkdale Shipping Co., S.A.*, No. 93-670 -- was both raised and passed upon by the court below in the instant case. Indeed, the Trial

Judge specifically addressed this issue by beginning his discussion of the law applicable to the case with the statement that a "shipowner has no independent duty to the longshoreman to inspect or supervise the stevedoring operation" (3a). This clearly was a statement of the Third Circuit's holding in *Derr v. Kawasaki Kisen K.K.*, 835 F.2d 490, (3d Cir. 1987), *cert. den'd.*, 496 U.S. 1007 (1988), which is the subject of the *Howlett* petition.

Because the Third Circuit's decision in *Derr*, *supra*, was binding on the Trial Judge in the court below, petitioner sought to establish that the facts of the case also brought the case within the shipowner's "active involvement" duty, a duty which was recognized by this Court in *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156 (1981). However, this attempt to bring the case within the "active involvement" duty did not change the fact the *Derr* decision, and its holding that a shipowner is not responsible for dangerous conditions arising from the manner in which cargo is stowed by a loading stevedore, was considered and relied upon by the Trial Judge in deciding the case. For this reason, should this Court, in *Howlett*, *supra*, now determine, that a shipowner *is* responsible for dangerous conditions in a cargo stow of which the shipowner knows or has reason to know, then the basic premise on which the Trial Judge decided the instant case would be incorrect, and the decision below should then be set aside and reconsidered.

While the *Howlett* case differs from the instant case in that, in *Howlett*, there is a factual dispute as to whether the dangerous condition was "open and obvious," whereas, in the instant case, the dangerous condition of the cargo stow admittedly was "open and obvious," this does not mean that this Court's decision in *Howlett* will not be controlling in the instant case, for there is no conflict in circuits with respect to

the vessel's responsibility for "open and obvious" conditions. Rather, every court which has had occasion to directly address the issue, including the Third Circuit in non-cargo stow cases, *see Kirsch v. Plovidba*, 971 F.2d 1026, 1031 f.n. 7 (3rd Cir. 1992), has held that the fact that a dangerous condition may be "open and obvious" does not automatically exonerate a vessel from liability, *see Moore v. M.P. Howlett*, 704 F.2d 39, 42 (1983), *Harris v. Reederei*, 657 F.2d 53, 54-55 (4th Cir. 1981), *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 852, f.n. 13 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050 (1990), *Martinez v. Korea Shipping Corp., Ltd.*, 903 F.2d 606, 610 (9th Cir. 1990), cited and followed in *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993). For this reason, the statement at page 6 of respondent's Brief in Opposition that, under the 1972 Amendments to the Longshore and Harbor Workers' Compensation Act, a shipowner should not be held liable for "open and obvious" conditions clearly is incorrect and contrary to the great weight of authority.

Respondent's argument that the issue of the shipowner's duty with respect to unsafe conditions in a cargo stow was "waived" (Respondent's Brief in Opposition, at page 6), is patently incorrect. *Illinois v. Gates*, 462 U.S. 213 (1983), on which respondent relies, clearly is not applicable to the facts of this case. *Illinois v. Gates*, *supra*, stands for the proposition that, in considering a petition for a writ of certiorari to review a decision of a state court, this Court will not consider issues which were "not pressed or passed upon" by the state court. *Illinois v. Gates* sets forth three bases for this rule, none of which are applicable to the instant case.

The first basis was that an issue which was "not pressed or passed upon" in the state court might not have an adequate factual record on which this Court could base review, see 462 U.S. at 221. This certainly is not true in the instant case as

the evidence as to the stowage of the cargo and the Captain's knowledge of the manner of stowage (10a-12a) clearly presents an adequate factual basis for considering that issue in this case.

The second basis for the *Gates* decision was concern for the relationship between this Court and state courts in giving state courts an appropriate opportunity to pass upon a particular issue. That also is not present in the instant case which involves a petition for a writ of certiorari addressed to a federal court, not a state court. Moreover, the Third Circuit has had numerous opportunities to address its decision in the *Derr* case and has refused to alter it.

The third basis for the "not pressed or passed upon" rule of *Illinois v. Gates* was to make sure that state courts had an opportunity to consider a particular issue with reference to the principle that a state court might decide an issue as one of state law, rather than of federal law, an issue clearly not applicable here where the issue is solely one of the interpretation of the federal maritime law.

Even if the "not pressed or passed upon" rule of *Illinois v. Gates* were deemed to be applicable to a petition for a writ of certiorari addressed to a federal court, rather than to a state court, it clearly would not preclude consideration of the instant petition, for the court below clearly "passed upon" the *Howlett* issue in the instant case by premising its decision on the principle that a shipowner had no duty of care with respect to dangerous conditions in a cargo stow created by a loading stevedore (3a).

Finally, the instant case is factually identical with the decision of the Ninth Circuit in *Riggs v. Scindia Steam Navigation Co.*, 8 F.3rd 1442 (9th Cir. 1993), in which the

shipowner has filed a petition for a writ of certiorari which is presently pending, *see Scindia Steam Navigation Co. v. Riggs*, Docket No. 93-1293 (62 L.W. 3632). Both the instant case and *Riggs* involve dangerous conditions created by the manner in which steel pipe was loaded aboard a ship by a foreign loading stevedore, with the danger being such that, even though open and obvious, it could not be avoided by the unloading longshoremen. The Ninth Circuit, in *Riggs*, specifically addressed the issue of whether the fact that an alleged dangerous condition was "open and obvious" would preclude a longshoreman from maintaining an action for negligence, and held that it would not. The issue presented in the instant case thus is identical with the issue already pending before this Court in the *Riggs* petition, and, therefore, if the *Riggs* petition is denied, then the petition in the instant case should be granted and the decision below should be reversed.

CONCLUSION

For all the foregoing reasons, and for the reasons set forth in the Petition, it is respectfully submitted that a Writ of Certiorari should issue to review the Judgment below.

Respectfully submitted,

Charles Sovel
Freedman and Lorry, P.C.
Continental Building,
Suite 900
400 Market Street
Philadelphia, PA 19106
(215) 931-2500
Counsel for Petitioner